REMARKS

I. Status of Claims

Claims 19–60, 62–68, 70–78, and 80–82 are currently pending in the present application. Independent claims 19, 57, 64, 74, and 82 are amended herein to incorporate the listing of fatty alcohols recited in claims 61, 69, and 79; accordingly, claims 61, 69, and 79 are canceled herein. Independent claims 19, 57, 64, and 74 are amended herein to incorporate the weight percentage limitations of claim 82. All amendments have written-description support in the originally filed application, and no new matter is added herein.

II. Claim Rejections Based on 35 U.S.C. § 103(a)

The Office rejects claims 19, 27–31, 35–54, 56, 57, 61–64, 69–71, 74, and 79–81 under 35 U.S.C. § 103(a) as unpatentable over U.S. Patent No. 5,693,677 to Lambers et al. *(Lambers)* in view of U.S. Patent No. 5,939,082 to Oblong et al. *(Oblong)* and DONALD YOUNG ET AL., FLUID MECHANICS 11–13 (2d ed. John Wiley & Sons) (*Young*). *See* Office Action at 2. The Office also rejects claims 19, 20, 27–30, 32, 33, 52–54, 56–58, 61, 64–66, 69, 72–76, and 82 as unpatentable over U.S. Patent No. 6,110,450 to Bergmann (*Bergmann*) in view of Flick, *Cosmetic & Toiletry Formulations* (1995) (*Flick*) and U.S. Patent No. 5,888,489 to von Mallek (*von Mallek*). *Id.* at 4. The Office rejects claims 21–26, 34, 59, 60, 67, 68, 77, and 78 as unpatentable over *Bergmann, Flick,* and *von Mallek* in further view of U.S. Patent No. 6,312,674 to Maubru (*Maubru*). *Id.* at 7. The Office rejects claims 35–51, 62, 63, 70, 71, 80, and 81 as unpatentable over *Bergmann, Flick,* and *von Mallek,* in further view of U.S. Patent No. 6,120,757 to Dubief et al. (*Dubief*). *Id.* at 8. Last, the Office rejects claims 35–51, 62, 63, 70, 71, 80,

and 81 as unpatentable over *Bergmann, Flick, von Mallek, Maubru,* in further view of U.S. Patent No. 5,587,155 to Ochiai et al. (*Ochiai*). *Id.* at 9. The nuances of the Office's rejection can be found in the Office Action at pages 2–12. Applicants respectfully submit that the rejected claims are patentably distinguishable from the references relied on in the claim rejections, and request reconsideration and withdrawal of the claim rejections for the reasons outlined below.

A. Rejections Under 35 U.S.C. § 103 Based on *Lambers, Oblong,* and *Young*

Claims 19, 27–31, 35–54, 56, 57, 61–64, 69–71, 74, and 79–81 were rejected under 35 U.S.C. § 103(a) as unpatentable over *Lambers* in view of *Oblong* and *Young. See* Office Action at 2. The nuances of the Office's rejection can be found in the Office Action at pages 2–4. Claims 19, 57, 64, and 74 are the only independent claims included in that claim rejection, and Applicants respectfully submit that those claims, as amended, are patentably distinguishable from the cited references.

Before the present amendments, the rejected independent claims 19, 57, 64, and 74 all recited, *inter alia*, liquid cosmetic compositions or methods relating to liquid cosmetic compositions comprising*:*

(a) at least one liquid fatty alcohol (containing no more than one hydroxyl group);
(b) at least one ceramide compound;
(c) at least one cationic surfactant*;* and
(d) wherein the composition has a viscosity of less than or equal to 1000 cP.

Notably, the Office has not rejected independent claim 82 based on *Lambers, Oblong,* and *Young*. Office Action at 2. Before the present amendments, claim 82 recited, *inter alia*, a liquid cosmetic composition comprising:

(a) at least one liquid fatty alcohol (present in an amount ranging from 1.5% to 10% by weight of the total composition);
(b) at least one ceramide compound;
(c) at least one cationic surfactant; and
(d) wherein the composition has a viscosity of less than or equal to 1000 cP.

Thus, in not rejecting claim 82, the Examiner must have correctly realized that *Lambers*, *Oblong*, and *Young*—whether viewed alone or in combination—fail to teach the weight percentage limitation of claim 82, because that is the only limitation in claim 82 that was not present in the other independent claims. Accordingly, in an effort to expedite prosecution, Applicants herein amend independent claims 19, 57, 64, and 74 to incorporate the weight percentage limitation of claim 82, further distinguishing the present application from the cited references, as implicitly suggested by the Examiner, to obviate this rejection.

Accordingly, Applicants respectfully request reconsideration and withdrawal of this rejection of claims 19, 27–31, 35–54, 56, 57, 61–64, 69–71, 74, and 79–81, as amended, based on *Lambers, Oblong,* and *Young*.

B. Rejections Under 35 U.S.C. § 103 Based on *Bergmann, Flick,* and *von Mallek*

The Office also rejects claims 19, 20, 27–30, 32, 33, 52–54, 56–58, 61, 64–66, 69, 72–76, and 82 as unpatentable over *Bergmann* in view of *Flick von Mallek*. Office Action at 4. The nuances of the Office's rejection can be found in the Office Action at pages 4–7. Claims 19, 57, 64, 74, and 82 are the only independent claims included in that claim rejection, and Applicants respectfully submit that those claims, as amended, are patentably distinguishable from the cited references.

As amended, independent claims 19, 57, 64, 74, and 82 are patentably distinguishable from *Bergmann* in at least three ways that are not cured by *Flick* and *von Mallek*, whether viewed individually or in combination. First, *Bergmann* explicitly mentions a viscosity outside the range of the amended claims. *Bergmann*, col. 8, ll. 42–43 (providing, in Example 1, that the final step in preparing a composition according to *Bergmann* requires "bring[ing] batch to pH 5.7-6.3 and **viscosity of 4,000-7,000 cps**") (emphasis added). The Office continues to disregard the explicit teachings of *Bergmann* on viscosity, despite Applicants' continued attempts to demonstrate otherwise. *See, e.g.*, Office Action dated Aug. 14, 2009 ("Bergmann . . . does not specifically mention the viscosity of the hair liquid composition."). See also the Final Office Action dated September 4, 2008, at 4 ("The reference [*Bergmann*] . . . does not specifically mention the viscosity of the hair liquid composition. See col. 7, ll. 27–38) to which Applicants directly responded in the Appeal Brief dated March 2, 2009, at 14–15 ("In the only disclosure in the reference directed to any specific viscosity of any disclosed composition, *Bergmann* teaches a shampoo having a viscosity of 4,000 to 7,000 cps. *See* Example 1, column 8, lines 42–43."). The Office has yet to acknowledge *Bergmann*'s failure to teach or suggest a liquid composition having a viscosity of less than or equal to 1,000 cps, as recited in the independent claims, ignoring the requirement that each prior art reference relied upon in a rejection must be considered "in its entirety, i.e., *as a whole*, including portions that would lead away from the claimed invention." *Graham v. John Deere Co.*, 383 U.S. 1, 17–18, 148 U.S.P.Q. (BNA) 459, 467 (1966); *see also* M.P.E.P. § 2141.02(I).

A second distinguishing factor between *Bergmann* and the present application, as noted by the Examiner in the Final Office Action dated September 4, 2008, at page 4, is that *Bergmann* discloses "using 0.001-1% phyantriol, which is a fatty alcohol," falling outside the range of "1.5% to 10%" of the at least one liquid fatty alcohol recited in the presently amended claims.

Third, *Bergmann* does not teach or suggest using at least one fatty alcohol containing no more than one hydroxyl group as required by the presently amended claims. *See Bergmann* col. 5, ll. 51–56 (teaching triols, for instance, which comprise three hydroxyl groups). The Office asserts that "the present specification does not support the exclusion of diols or triols from the claimed composition," and "construes the claim[s] in such a way that [they] would not exclude the presence of liquid fatty alcohols with more than one hydroxyl group[]." Office Action at 4. Applicants do not necessarily agree with the Office's assertions. However, in an effort to expedite prosecution, Applicants herein amend independent claims 19, 57, 64, 74, and 82 to recite that the at least one fatty alcohol must be chosen from "lauryl alcohol, isomyristyl alcohol, isostearyl alcohol, isocetyl alcohol, isoarachidyl alcohol, 2-octyldodecanol, 2-butyloctanol and oleyl alcohol", as recited in claims 61, 69, and 79. Nothing in *Bergmann* teaches the necessity of having at least one fatty alcohol chosen from this group of compounds, and the Office has not alleged otherwise.

The three above-highlighted deficiencies in *Bergmann* are not cured by the addition of *Flick* and *von Mallek* under U.S. patent law. The U.S. Supreme Court in *KSR* specifically confirmed that, "as is clear . . . , a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was,

independently, known in the prior art," and that the Office must still provide some explicit rational support for why one of ordinary skill in the art would have been motivated to make the combination. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 419, 82 U.S.P.Q.2d (BNA) 1385 (2007).

The Office never provides any rationale for why a skilled artisan would have, for instance, been motivated to combine *Flick* and *Bergmann* to arrive at the claimed viscosity; rather, the Office flatly states that "*Flick* teaches a hair liquid formulation having a viscosity of 6 cps" before moving on to a discussion of weight percentages disclosed in *Flick*. Office Action at 5. The Office later notes that "[s]ince *Bergmann* teaches to make fluid or liquid compositions comprising fatty alcohols and ceramide and *Flick* teaches a hair liquid product having a viscosity of 6 cps, by combining the teachings of the references the skilled artisan would have had a reasonable expectation of successfully producing an emollient . . . composition that has a suitable viscosity for application to the hair." *Id.* at 6–7. In those conclusory statements, the Office has failed to carry its burden as articulated by the Supreme Court in *KSR*, especially in view of the express teachings away in *Bergmann* of a higher viscosity cream product.

Similarly, the Office has not met the burden of establishing any motivation on the part of the skilled artisan to combine the three cited references, other than asserting that the three references generally teach fatty alcohols in hair treatments. *See* Office Action at 6. See also the Appeal Brief filed March 2, 2009, at 15–16 (explaining that "the mere fact that the compositions of both *Bergmann* and *Flick* include some sort of fatty alcohol is not a sufficient nexus which would lead a skilled artisan to combine the teachings of *Flick* and *Bergmann*"), a point applying with equal force in the present rejection's

combination of *Flick, Bergmann, and von Mallek*, and a point found persuasive by the Office in the present Office Action at 11. Applicants submit that the Office has failed to set forth a prima facie case of obviousness at least for the reason that *Flick* and *von Mallek* do not make up for the deficiencies in *Bergmann*, as highlighted above. Accordingly, Applicants respectfully request reconsideration and withdrawal of this rejection, and allowance of the claims.

Additionally, because this constitutes the Office's only rejection of independent claim 82, Applicants respectfully submit that the current amendment places claim 82 in condition for immediate allowance, and respectfully request allowance of that claim.

C. Rejections Under 35 U.S.C. § 103 Based on *Bergmann, Flick, von Mallek,* and *Maubru*

The Office rejects dependent claims 21–26, 34, 59, 60, 67, 68, 77, and 78 as unpatentable over *Bergmann, Flick,* and *von Mallek* in further view of *Maubru*. Office Action at 7. This ground of rejection was rendered moot by the amendments to the independent claims 19, 57, 64, and 74. Accordingly, Applicants respectfully request withdrawal of this rejection, and allowance of dependent claims 21–26, 34, 59, 60, 67, 68, 77, and 78.

D. Rejections Under 35 U.S.C. § 103 Based on *Bergmann, Flick, von Mallek, Maubru,* and *Dubief*

The Office rejects dependent claims 35–51, 62, 63, 70, 71, 80, and 81 as unpatentable over *Bergmann, Flick, von Mallek, Maubru,* in further view of *Dubief*. Office Action at 8. This ground of rejection was rendered moot by the amendments to the independent claims 19, 57, 64, and 74. Accordingly, Applicants respectfully request

withdrawal of this rejection, and allowance of dependent claims 35–51, 62, 63, 70, 71, 80, and 81.

E. Rejections Under 35 U.S.C. § 103 Based on *Bergmann, Flick, von Mallek,* and *Ochiai*

Last, the Office rejects claims 35–51, 62, 63, 70, 71, 80, and 81 as unpatentable over *Bergmann, Flick, and von Mallek,* in further view of U.S. Patent No. 5,587,155 to Ochiai et al. (*Ochiai*). Office Action at 9. Each of those claims depend, directly or indirectly, from an allowable independent claim, and should be allowable for at least the same reasons that the independent claims are allowable (*see* discussion *supra* Part II.D). Accordingly, Applicants respectfully request withdrawal of this rejection, and allowance of dependent claims 35–51, 62, 63, 70, 71, 80, and 81.

III. Conclusion

In view of the foregoing amendment and remarks, Applicants respectfully request reconsideration of this application and the timely allowance of the pending claims.

If the Examiner believes that a telephone conversation might advance prosecution of this application, the Examiner is cordially invited to call Applicants' undersigned representative at (404) 653-6553.

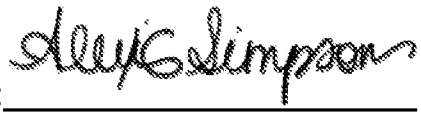
Applicants respectfully submit that the Office Action contains a number of assertions concerning the related art and the claims. Regardless of whether those assertions are addressed specifically herein, Applicants respectfully decline to automatically subscribe to them.

Please grant any extensions of time required to enter this response and charge any additional required fees to our Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: November 16, 2009

By: 

Alexis N. Simpson
Reg. No. 63,686